# Public Prosecutor v Gunus Sagena

HIGH COURT (TAWAU) — CRIMINAL TRIAL NO T (45)–9 OF 2008
RHODZARIAH BUJANG JC
2 NOVEMBER 2010

*Criminal Law — Murder — Defence — Grave and sudden provocation — Allegation that deceased taunted accused of committing bestiality — Whether long gap between provocative taunt and homicidal act — Whether element of premeditation or revenge present — Whether accused deprived of power of self control by taunts of deceased — Whether accused should be charged with reduced charge of culpable homicide not amounting to murder — Penal Code ss 302 & 304(a)*

*Criminal Law — Penal Code — s 302 — Death caused by bodily injury — Whether there was sufficient evidence to connect accused to killing — Whether deceased could have died due to medical negligence during surgery*

*Evidence — Character of accused — Demeanour of accused after attack — Whether demeanour supported accused's defence that attack was spontaneous*

*Evidence — Statement — Contemporaneous statement — Whether accused's answer when arrested was contemporaneous statement sufficiently corroborated his defence*

When Alias bin Sape ('the deceased') taunted Gunus Sagena of committing bestiality with a fighting cockerel the latter retaliated by slashing the deceased to death. The accused was charged with murder under s 302 of the Penal Code ('Code'). The deceased's wife who was present at the time of the attack testified that the accused had attacked her husband with an axe and also a samurai sword. However, in cross-examination she was unable to verify whether the samurai sword had also been used in the attack. The police officer who arrested the accused ('the arresting officer') gave evidence that when the accused surrendered himself to the officer he was holding a blood-stained samurai sword in his hand. The arresting officer also said that when he questioned the accused as to why he had slashed the deceased, the accused had answered that he was hurt by the deceased's accusation that he had committed bestiality with a fighting cockerel. The pathologist certified that the cause of death was hypovolaemic shock as a consequence of the three stab wounds to the

deceased's chest, abdomen and neck. Although she was unable to comment on the weapons used in inflicting the wounds, because these wounds had been surgically extended, she went on to say that the injuries to the neck, chest and abdomen of the deceased were consistent with having been caused by a weapon such as the samurai sword, as shown in the photographic exhibit. The chemist, who analysed the samurai sword and the axe, gave evidence that the blood stains on the sword and axe matched the deceased's DNA profile. However, after the chemist's analysis of the samurai sword, the sword went missing and neither the sergeant in charge of the store nor the investigating officer of this case were able to enlighten the court on what happened to the missing sword. The accused, who elected to give sworn evidence, raised the defence of grave and sudden provocation. According to the accused, the deceased had taunted him with the question whether he had committed bestiality with a fighting cockerel at least ten times in the course of five days and that this had provoked the accused to attack the deceased. The accused also testified that it was not his intention to kill the deceased but to only teach him a lesson not to use foul language on him again.

**Held**, sentencing the accused to 18 years imprisonment:

(1) Despite what the deceased's wife said in cross-examination, her evidence established that the man who attacked the deceased that day was none other than the accused and that an axe was definitely used in the attack. The evidence of the arresting officer reinforced the evidence of the deceased's wife that the accused brought along the samurai sword and the axe when he went to attack the deceased. Further, through the evidence of the chemist who analysed the samurai sword and the axe, it was proven that the sword and the axe were used to inflict the injuries on the deceased on the said date. Based on the direct evidence of the deceased's wife and the arrest of the accused soon after the attack on the deceased with the sword which bore the blood stains of the deceased and the discovery of the axe which similarly had the deceased's blood stain near the accused's house, there was more than ample evidence to connect him to the death of the deceased, from the injuries sustained during the attack. The evidence had withstood the maximum evaluation as required (see paras 5–9 & 19).

(2) The missing sword did not compromise the case for the prosecution because of the photograph of the weapon, which rendered identification of it and corroboration of the relevant witnesses' evidence on it possible (see para 15).

(3) The accused's submission that the deceased could have died due to medical negligence during the surgery could not stand. In a case such as the present, where death is caused by bodily injury, the person who caused such injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment death might have been prevented (see paras 16 & 18).

(4) It was found that there was very little time gap between the time the deceased uttered the impugned words to the time of the attack by the accused, for the latter had gone straight to his house to get the samurai sword and out again to the deceased's house after the deceased uttered the taunt on the day of the killing. As such the element of premeditation or revenge was definitely not present. Further, the accused, who had been repeatedly mocked about having committed bestiality by the deceased, must have lost his power of reasoning at the time of the killing. As such the provocation was indeed grave and sudden, in that he reacted right after the latest mocking (see paras 25–26).

(5) The evidence of the arresting officer as to the response given by the accused as to why he had slashed the deceased was a contemporaneous statement made by the accused that afforded sufficient corroboration of his defence when taken together with the accused's demeanour after the attack. The same demeanour accords well with the accused's defence that the attack was spontaneous and his rage severe because after it was over, sanity returned and the accused was docile again (see para 30).

**[Bahasa Malaysia summary**

Apabila Alias bin Sape ('si mati') mencemuh Gunus Sagena melakukan perbuatan kebinatangan dengan ayam sabung, Gunus Sagena membalas dengan menyelar si mati hingga mati. Tertuduh dituduh dengan pembunuhan di bawah s 302 Kanun Keseksaan ('Kanun'). Isteri si mati yang hadir pada masa serangan tersebut memberi keterangan bahawa tertuduh telah menyerang suaminya dengan sebilah kapak dan juga pedang samurai. Namun begitu, dalam pemeriksaan balas, dia tidak boleh mengesahkan sama ada pedang samurai tersebut juga digunakan dalam serangan itu. Pegawai polis yang menangkap tertuduh ('pegawai yang menangkap') memberi keterangan bahawa apabila tertuduh menyerah diri kepada pegawai tersebut, dia sedang memegang pedang samurai yang berlumuran darah dalam tangannya. Pegawai yang menangkap tersebut juga menyatakan bahawa apabila dia menyoal tertuduh mengapa dia menyelar si mati, tertuduh menjawab bahawa dia telah tersinggung dengan tuduhan si mati yang dia telah melakukan perbuatan kebinatangan dengan ayam sabung. Ahli patologi mengesahkan bahawa sebab kematian adalah kejutan *hypovolaemik* akibat daripada tiga kesan tikaman di dada si mati, abdomen dan leher. Walaupun dia tidak boleh mengulas tentang senjata-senjata yang digunakan yang mengakibatkan kecederaan-kecederaan tersebut, kerana kecederaan-kecederaan tersebut ditambah lagi dengan

pembedahan, dia seterusnya menyatakan bahawa kecederaan-kecederaan kepada leher, dada dan abdomen si mati konsisten dengan diakibatkan oleh senjata seperti pedang samurai, seperti yang ditunjukkan dalam ekshibit bergambar. Ahli kimia, yang menganalisa pedang samurai dan kapak, memberi keterangan bahawa kesan-kesan darah pada pedang dan kapak sepadan dengan profil DNA si mati. Tetapi, selepas analisa ahli kimia terhadap pedang samurai itu, pedang tersebut hilang dan kedua-dua sarjan stor dan pegawai penyiasat kes ini tidak dapat memberi penjelasan kepada mahkamah tentang apa yang berlaku kepada pedang yang hilang itu. Tertuduh, yang memilih untuk memberi keterangan bersumpah, membangkitkan pembelaan bangkitan marah besar dan mengejut. Menurut tertuduh, si mati telah mencemuhnya dengan soalan sama ada dia telah melakukan sifat kebinatangan dengan ayam sabung sekurang-kurangnya sepuluh kali dalam masa lima hari dan ini telah membangkitkan kemarahan tertuduh untuk menyerang si mati. Tertuduh juga memberikan keterangan bahawa bukanlah niatnya untuk menyerang si mati. Tertuduh juga memberi keterangan bahawa bukanlah niatnya untuk membunuh si mati tetapi hanya untuk memberi pengajaran sahaja agar tidak lagi menggunakan kata-kata kesat kepadanya.

**Diputuskan**, menghukum tertuduh penjara 18 tahun:

(1) Meskipun apa yang dikatakan isteri si mati dalam pemeriksaan balas, keterangannya membuktikan bahawa lelaki yang menyerang si mati pada hari itu tidak lain tidak bukan adalah tertuduh dan bahawa sebilah kapak memang digunakan dalam serangan tersebut. Keterangan pegawai yang menangkap mengukuhkan lagi keterangan isteri si mati bahawa tertuduh membawa bersamanya pedang samurai dan kapak tersebut apabila dia menyerang si mati. Selanjutnya, menerusi keterangan ahli kimia yang menganalisa pedang samurai dan kapak tersebut, telah terbukti bahawa pedang dan kapak itu digunakan untuk mencederakan si mati pada tarikh tersebut. Berdasarkan keterangan langsung isteri si mati dan penangkapan tertuduh sejurus selepas serangan terhadap si mati dengan pedang yang berlumuran darah si mati dan penemuan kapak tersebut yang juga mempunyai kesan darah si mati berdekatan rumah si mati, terdapat keterangan yang lebih daripada cukup untuk mengaitkannya dengan kematian si mati, berdasarkan kecederaan-kecederaan yang dialami semasa serangan tersebut. Keterangan tersebut mencapai taraf penilaian maksimum yang dikehendaki (lihat perenggan 5–9 & 19).

(2) Pedang yang hilang itu tidak menjejaskan kes pihak pendakwa kerana gambar senjata itu yang menjadikan pengecamannya dan keterangan sokongan saksi-saksi relevan berkemungkinan (lihat perenggan 15).

(3) Hujah tertuduh bahawa si mati mungkin mati akibat kecuaian perubatan semasa pembedahan tidak kukuh. Dalam kes seperti ini, apabila kematian disebabkan kecederaan pada badan, orang yang mengakibatkan kecederaan tersebut harus dianggap telah menyebabkan kematiannya, walaupun dengan mengambil ubat-ubatan dan rawatan pakar, kematian mungkin boleh dielakkan (lihat perenggan 16 & 18).

(4) Didapati bahawa terdapat jarak waktu yang singkat antara waktu apabila si mati mengucapkan kata-kata tersebut hingga waktu serangan oleh tertuduh, kerana tertuduh terus ke rumahnya untuk mengambil pedang samurai dan keluar lagi ke rumah si mati selepas si mati mencemuhnya pada hari pembunuhan. Oleh itu, unsur merancang terlebih dahulu atau balas dendam langsung tiada. Selanjutnya, tertuduh yang telah dihina berkali-kali tentang melakukan perbuatan kebinatangan oleh si mati, tentunya telah hilang kewarasan pada masa pembunuhan itu. Oleh itu, provokasi adalah serius dan tiba-tiba yang mana dia bertindak balas sejurus selepas penghinaan terakhir (lihat perenggan 25–26).

(5) Keterangan pegawai yang menangkap kepada keterangan tertuduh mengapa dia menyelar si mati adalah keterangan sezaman dibuat oleh tertuduh yang memberikan sokongan yang mencukupi bagi pembelaannya apabila diambil bersama dengan perilaku tertuduh selepas serangan tersebut. Perilaku yang sama sejajar dengan pembelaan tertuduh bahawa serangan tersebut adalah spontan dan kemarahannya adalah teramat sangat kerana apabila telah berlalu, kewarasan fikirannya kembali dan tertuduh seperti biasa semula (lihat perenggan 30).]

**Notes**

For a case on defence of murder, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1157.

For cases on character of accused in general, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 673–698.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

For cases on statement in general, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2411–2618.

**Cases referred to**

*Chan Kwee Fong v PP* [2010] 1 MLJ 441, CA (refd)

*Che Omar bin Mohd Akhir v PP* [1999] 2 MLJ 689; [1999] 2 CLJ 780, CA (refd)

*Lorensus Tukan v PP* [1988] 1 MLJ 251, SC (refd)

*PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

**Legislation referred to**

Penal Code ss 299, 302, 304(a), 326

*Raja Zaizul Faridah binti Raja Zaharudin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.*

*Mohammad Fadzlullah bin Zainal Abidin (Rozainah & Co, Advocates) for the accused.*

**Rhodzariah Bujang JC:**

**[1]** It was a case of ribbing which went horribly wrong — the death of a man and with another facing the death penalty. So it came to be that the accused, Gunus Sagena was charged with murdering his own neighbour and fellow villager (the late Alias bin Sape) on 8 August 2007. The prosecution called a total of 13 witnesses to prove that he committed the offence, their star witness being the victim's own wife. This is her evidence.

EVIDENCE OF THE VICTIM'S WIFE

**[2]** Puan Ati binti Arpawahid, the victim's wife ('PW7') testified that on the said date at around 12.30pm she had just finished having lunch with her husband at a resting area beneath their house (called *kolong* in local lingo) when the accused, whom she knew as a fellow villager, came and attacked her husband with an axe. She saw him slashed her husband on the stomach. She herself was injured on her shoulder when she tried to stop the attack. She had sought treatment from the hospital for her injury and the doctor treating her ('PW8' — Dr Kuganeshvaran a/l Muniandy) confirmed that she suffered soft tissue injury to her right shoulder as a result of blunt force being applied there. However, he noted that there were no bruises seen on the injured shoulder.

**[3]** Puan Ati further testified that after the initial attack, her husband ran up the lane leading from their house, with the accused in hot pursuit. As for herself, she ran to hide in her neighbour's house, Puan Murni binti Paddu ('PW6') and remained there until the police came. This fact Puan Murni confirmed in her own evidence.

**[4]** Puan Ati identified the axe and also a samurai sword which she said was also used by the accused from the photographs taken of the exhibits ('exhs P4(a) & (b)').

**[5]** In cross-examination, she reiterated that she saw the accused used the axe to slash her husband on the stomach even though in her police report she did not state that the weapon used was an axe. She denied that her husband had degraded the accused by saying that he ('the accused') had committed bestiality

with a fighting cock. Puan Ati also revealed that when the accused first came to their house, the axe and the samurai sword he was carrying were wrapped nicely in a plastic rice package and she was not sure whether, when the attacks were made on her husband, the weapons had been unwrapped and whether the samurai sword was also used in the attack.

**[6]** In re-examination, she said she was able to identify the two weapons used, even when they were wrapped, from their forms. Despite what she said in cross-examination, I am satisfied from her evidence that the man who attacked her husband that day was none other than the accused and an axe was definitely used in the attack.

**[7]** A fellow villager of the victim and the accused, Encik Mohd Jahari bin Paita ('PW5'), who investigated a commotion, found the victim who had collapsed but was still alive and sent him to the hospital. He also made a call to the police which call was answered by Lance Corporal Eldie @ Redi bin Sah ('PW2'). Lance Corporal Eldie went to the scene and found the accused standing near his house holding a samurai sword in his hand. The samurai sword he identified from the same photograph ('exh P4(b)'). The accused surrendered himself to Lance Corporal Eldie who also seized the sword. In his cross-examination Lance Corporal Eldie said he did ask the accused why he slashed the victim and his answer was because he was hurt by the victim's accusation that he committed bestiality with a fighting cockerel. Although he remembered handing over the accused to the investigating officer of the case, Lance Corporal Nur Intan bt Jamrin ('PW11') but he could not recall to whom the samurai sword was given to. He was however not sure whether there were blood stains on the sword. The evidence of Lance Corporal Eldie who arrested the accused with the samurai sword reinforced the evidence of Puan Ati that the accused brought along the sword and the axe when he went to attack her husband.

**[8]** Another villager, Encik Zainuddin Pasinring ('PW3') gave evidence on his discovery of the axe on the ground of the scene as shown in photograph exh P3(c) the same day after hearing about the accused injuring the victim. He identified the axe from its photograph ('exh P4(a)'). He took the axe and handed it over to the headman of their village, Encik Amat Wagiman ('PW4'). The headman confirmed receiving the axe which was covered with paper and plastic on the same day and which he handed over to the police the next day but he could not remember the identity of the policeman he handed it to.

THE EXPERT WITNESSES

**[9]** The pathologist in her evidence and report ('exh P16') noted and described 12 injuries on various parts of the victim's body — stab wounds,

incised wounds, abrasions and lacerations. Notable among these wounds were the stab wounds to the chest, the abdomen and the neck. The cause of death certified by her was hypovolaemic shock due to or as a consequence of these three wounds. These stab wounds were fatal according to her and chances of survival were slim. However, because these three wounds had been surgically extended and the original size of the wounds altered, the pathologist was unable to comment on the weapons used in inflicting the wounds. She was able to say, however that the injuries to the neck, chest and abdomen of the victim were consistent with having been caused by a weapon like the samurai shown in photograph exh P4B, whereas the injury to the head can be caused by either weapon.

**[10]** In cross-examination, she testified that based on the hospital records the victim had undergone surgery, inserted with chest tube and given blood/fluid transfusion. However, she could not tell who the doctor(s) performing the surgery was (were). She agreed with the defence counsel that some instruments used during surgery were capable of inflicting the wounds found externally or internally on the victim.

**[11]** The chemist, Mr Phoon Yoong Keat ('PW9') analysed the sword and the axe which were in packages marked 'exh 1' and 'exh 13' respectively and found the blood stains on them to match the DNA profile developed from the bone and body tissue specimen taken from the victim during the post-mortem. Thus, it was proven through his evidence that the sword and the axe were used to inflict the injuries on the victim on the said date. However, though the axe was produced and exhibited in court, the sword was not. It went missing whilst in police custody after being returned by the chemist.

THE MISSING SWORD

**[12]** One Sergeant Jahaluddin bin Jambangan ('PW12') was called to explain, (quite futile, as it turned out to be) the mystery of the missing sword. He was the officer in charge of the exhibit store of the Police Headquarters in Tawau. An extract from the exhibit register book recording the movement of the sword (and other exhibits in this case) was tendered through him as exhs P18(a) and (b). According to the witness, the sword together with other exhibits marked as exh 2, exh 5–exh 11, exh 14 and exh 19 were taken out on 27 May (the year was not clearly stated) but there was no record of the exhibits being returned. However he said all the other exhibits have been found in the store but not the sword. In cross-examination, the witness said the sword and the axe were taken out from the store on 14 August 2007 by Inspector Azmani and it was recorded in the extract of the register book that they were to be taken to the hospital in order to make a report but they were afterwards returned. He also testified that on 10 August 2007, a photograph of the sword was taken and

it was taken out from the store for that purpose but there was no record of its return to the store in the register book. He said the photograph was taken at the store even though the defence counsel pointed out to him that an album of the photographs of the exhibits tendered to the court stated that it was taken at the office of the investigating officer in Police Headquarters Tawau.

**[13]** The evidence of this witness clearly demonstrates that there was no proper recording of the movement of the exhibits and accountability of the officers in charge of their safety. Though he was in charge of the store, the Sergeant was unable to shed any light as to what had happened to the sword.

**[14]** The investigating officer who was called after him too was unable to enlighten the court on what happened to the sword. He confirmed, however that the photographs of the sword and other exhibits were taken at his office but the exhibits were returned to the store after that.

**[15]** Despite this unsatisfactory state of the evidence, I am of the view that the missing sword did not compromise the case for the prosecution because of the photograph of the weapon, rendering identification of it and corroboration of the relevant witnesses' evidence on it, possible.

CROSS-EXAMINATION OF THE INVESTIGATING OFFICER

**[16]** When the investigating officer was cross-examined he mentioned that the doctor who performed the surgery on the victim was one Dr Ting, a Burmese who had since gone back to Burma. It was put to him but he disagreed that the victim could have died due to medical negligence during the surgery.

**[17]** This line of questioning which was adopted for the pathologist as well, cannot, in view of explanation 2 to s 299 of the Penal Code be of any use to the defence.

**[18]** Explanation 2 provides that where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to *proper remedies* and *skillful treatment* death might have been prevented. Therefore, although the hospital record of the victim's surgery was never produced nor the surgeon who performed it was called, this failure is not sufficient justification for me to reduce the charge to s 326 of the Penal Code as submitted by the accused's counsel.

A PRIMA FACIE

**[19]** Based on the direct evidence of the victim's wife and the arrest of the

accused soon after the attack on the victim with the sword which bore the blood stains of the victim and the discovery of the axe which similarly had the victim's blood stain near the accused's house, there is more than ample evidence to connect him to the death of the victim from the injuries sustained during the attack. The evidence as I had narrated earlier had, in my view withstand the maximum evaluation as required by the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457. The accused was thus called to give his defence to the charge.

THE ACCUSED'S DEFENCE

**[20]** The accused elected to give sworn evidence. He said he on the day in question he was working at his '*kolong*', building a room thereat, when the victim passed him by and called out to him, '*Kamu sudah kentot ayam?*' The direct translation of that is 'Have you had sex with a cockerel?' The accused repeated this phrase later in his evidence but instead of using the word '*kentot*', he changed it to '*rogol*' meaning rape. According to him the victim had uttered the same question for at least ten times and for the past five days prior to the incident. The last time the victim uttered it on that fateful day, the accused said he straight away went up to his house, took the samurai, went over to the victim's house which was just ten feet away and slashed him on the stomach. When the victim ran, he said he pursued him and again slashed him on the neck. He said he had no intention to kill the victim — only to teach him a lesson so as not to use such foul language on him again. His intention, said the accused was only to slash the victim's feet but the samurai cut the victim's stomach instead.

**[21]** He however denied using the axe even though he admitted that it was underneath his house and when asked by the learned deputy public prosecutor how blood stains of the victim was found on it, he claimed that the villagers must have planted the evidence there as they hated him. Such denial from him is to me is quite immaterial as the pathologist herself was unable to say which of the two weapons was used to deliver the fatal blow. Furthermore, the accused himself admitted slashing the victim on his stomach and his neck — the two wounds which the pathologist mentioned (in addition to the wound to the chest) which caused the hypovolaemic shock leading to the victim's death. The only issue which is to be determined is whether he has succeeded in proving a defence of grave and sudden provocation.

THE DEFENCE OF GRAVE AND SUDDEN PROVOCATION

**[22]** It has been decided by the Federal Court in *Che Omar bin Mohd Akhir*

*v Public Prosecutor* [1999] 2 MLJ 689; [1999] 2 CLJ 780 that the burden on the accused to prove the defence of grave and sudden provocation is on a balance of probability.

**[23]** In *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251, the Supreme Court formulated the test to determine this defence and that is '*whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control*'. Seah SCJ further added that *'what a reasonable man will do in certain circumstances depends upon the custom, manners, way of life, traditional value, etc. In short, the cultural, social and emotional background of the society to which an accused belongs'.*

**[24]** The Court of Appeal in the recent case of *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441 has in turn formulated this question which the court must ask and that question is:

> Whether the accused was still deprived of his power of self control at the time of the killing.

Abdul Malik Ishak JCA held in the said judgment, following *Che Omar* 's case that '*the longer the time gap between the provocative episode and the homicidal act, the more likely that it will be construed that the accused had killed due to premeditation or revenge*'.

**[25]** Taking that last principle first and contrary to the submission of the learned deputy public prosecutor, I have no doubt that there was very little time gap between the time the victim uttered the impugned words to the time of the attack, for he had gone straight to his house to get the samurai sword and out again to the victim's house (which is just next to his as shown in the photographs 'exh P3(c)' and 'exh P3(d)'. The element of premeditation or revenge, was definitely not present.

**[26]** Was the accused then deprived of his power of self-control by the mocking and taunts of the victim that he committed bestiality with a cockerel? My answer to that is in the positive as he was consumed with the desire to teach the victim a lesson for his foul mouth. It must be remembered that the mockery and the taunts were not just said once but repeated over five days and for no less than ten times. The accused, as his counsel has submitted is just a simple villager — a carpenter with no educational background. To be repeatedly mocked about committing bestiality by his own neighbor must have caused him to snap and made him lose control of his power of reasoning.

**[27]** His counsel submitted that even when he posed the question to the victim's wife in cross-examination regarding the victim's mocking of his client,

which question when asked in local Sabah Malay, viz '… *bersetubuh dengan ayam*', the people in the public gallery could not stifle their laughter and sniggering. In actual fact, the words used by the victim in Malay language sounds a lot cruder and more offensive than what is understood from the word 'bestiality' and yes, the common reaction would always be one of ridicule and incredulity. A very small segment of the society in the public gallery exhibited this reaction when these words were uttered which I was able to see for myself.

**[28]** The accused, justifiably was enraged and that he was so was shown by his further action. After slashing the victim, he said he called out to the victim's wife to come out from hiding and shouted to all and sundry (as in his evidence) to reveal themselves if they too thought he had committed bestiality. This commotion was corroborated in the evidence of Encik Mohd Jahari ('PW5') who sent the victim to the hospital.

**[29]** His counsel submitted that to be accused of bestiality is even more damaging than to be accused of say, adultery to a simple village man like his client. That I would agree as only a depraved person would commit such a thing and to accuse a man of the accused's simple background or, any other man for that matter, of this is surely a form of ultimate degradation — to be taunted and mocked everyday about it by one's own neighbour made it worst. The provocation was indeed grave and that it was sudden I have earlier mentioned which was the spontaneous act of the accused in going up to his house to get the sword and proceeding to the victim's house right after the latest mocking. In reaching the above conclusion, I note that Encik Mohd Jahari ('PW5') had testified that the accused reared fighting cockerels so I could not dismiss the taunting of the victim as a mere teasing which the accused should have ignored. That the two men were neighbours as testified by the accused is borne out by the photographs taken at the scene showing views of the two houses.

**[30]** The learned deputy public prosecutor in her written submission said it was only the words of the accused that the victim uttered this accusation — the victim's wife had flatly denied it. However, she has omitted to refer to the evidence of Lance Corporal Eldie ('PW2'), the policeman who arrested the accused shortly after the attack and whose evidence was that after the attack he found the accused standing placidly with the sword in his hands and when he questioned him why he attacked the victim, the accused's answer was he was angry because the victim accused him of bestiality. This was a contemporaneous statement made by him and is to my mind sufficient corroboration of his defence when taken together with his demeanour after the attack as described above. The same demeanour accords well with his defence that the attack was spontaneous and his rage severe because after it was over, sanity returned and the accused was docile again.

**[31]** Bearing in mind that the burden to prove his defence is only on a balance of probability, the considerations of the evidence as highlighted above is sufficient, in my view, to discharge it. I would, therefore, reduce the charge from one of murder under s 302 to that of culpable homicide not amounting to murder under s 304(a) of the Penal Code. I choose that particular section because in my assessment of his evidence and given the numerous slash wounds suffered by the victim (twelve in all as described in the pathologist report), he surely had the intention to cause such bodily injuries as were likely to cause the death of the victim when he went amok on that day.

**[32]** After considering the relevant factors during the sentencing, I ordered the accused to be imprisoned for 18 years commencing from the date of his arrest.

**[33]** In respect of the exhibits tendered at the trial, I order exhs P13, 13(a)–(i), P14, P14(a)–(c) and P27(a)–(g) to be destroyed by the prosecution after the lapse of the appeal period.

*Accused sentenced to 18 years imprisonment.*

Reported by Kohila Nesan